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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 368

MICHAEL B. TENORE AND JOSEPH SCARAMUZZO, CO-PARTNERS DOING BUSINESS AS RICO SALES COMPANY, A PARTNERSHIP,

Petitioners,

vs.

AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, ET AL.,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE LAW PRINT WARREN PRINTING COMPANY, CHICAGO

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ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit is respectfully submitted to this Honorable Court on behalf of American and Foreign Insurance Company of New York, a corporation, Centennial Fire Insurance Company of New York, a corporation, The Commercial Union Fire Insurance Company of New York, a corporation, Continental Insurance Company, a corporation, Detroit Fire and Marine Insurance Company, a corporation, The American Insurance Company of Newark, New Jersey,

a corporation, The Home Insurance Company, a corporation, and Old Colony Insurance Company, a corporation, respondents herein, and is in opposition to the Petition for Writ of Certiorari herein sought to review a judgment of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED.

1. Does a Court of Appeals have the power on review to reverse a finding of a trial judge, if, in its opinion, from an examination of the entire evidence, said finding is clearly erroneous?

STATEMENT OF THE CASE.

Respondents herein adopt as their Statement of the Case that portion of the opinion of the United States Court of Appeals for the Seventh Circuit issued on June 19, 1958, and written by Chief Judge Duffy on behalf of a unanimous court which relates the factual circumstances giving rise to this controversy. Said statement of the case is found in Appendix A of the Petition for Writ of Certiorari herein filed by petitioners and appears at pages 1a through 4a of said Appendix.

Respondents are compelled to disregard the statement of the evidence found in the petition filed herein for the reason that said statement of the evidence is written to create the impression that one Frank Hunt, a salvage supervisor at a warehouse owned by the Underwriters Salvage Company and an agent of the respondents here, played a part in determining the value of the guns and gun parts herein in question. The italicizing of the clause descriptive of Hunt on page 5 of the petition gives rise to an inference clearly opposite to the facts found in the record of this cause.

In said record, at page 191, the following testimony appears:

> "The Court: As far as that is concerned, your testimony is that you had nothing to do with fixing values and you do not purport to know values—
> Mr. Hunt: That is correct, I don't know."

The trial judge, at page 956 of the record, in rendering his opinion on the questions herein presented, stated unequivocally that in the determination of values:

> "* * * the evidence showed that Mr. Scaramuzzo [one of the petitioners herein] is the one who made the decisions. Mr. Hunt had nothing to do with deciding, he merely wrote down the values."

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondents respectfully submit that there is no good reason for this Court to grant the writ of certiorari herein sought. Although respondents can not help but desire the imprimatur of this highest court upon the decision heretofore rendered by the Court of Appeals for the Seventh Circuit, they are compelled to oppose the granting of this writ, as there is no vital question presented in this case to which this Honorable Court should devote itself. There is no federal question presented in this diversity action. There is no novel question here relative to the supervision of the Courts of Appeal, nor is there any conflict of decisions among the Courts of Appeal of the various circuits on any of the issues herein involved. Respondents respectfully submit that petitioners here seek nothing but a second review of the evidence by this highest tribunal.

The major emphasis of the Petition for the Writ of

Certiorari, as it was in the Petition for Rehearing submitted on behalf of petitioners here to the Court of Appeals for the Seventh Circuit, is an argument that a Court of Appeals has no right to examine the facts developed in the court below or to consider, on review, the inferences drawn from those facts by the trial judge. We respectfully submit that such an argument is without foundation and is neither supported by the Rules of Civil Procedure nor by any case cited by petitioners, either to this Court or to the Court of Appeals below.

Petitioners here, as they did in their Petition for Rehearing, protest that the Court of Appeals did not see the petitioner Scaramuzzo sit on the witness stand and swear that in his opinion the value of old and mutilated weapons of 1890 vintage is the same as that taken from the current manufacturers' catalogues. This testimony of the expert Scaramuzzo, a man who has been a gunsmith for almost his entire span of life, was not testimony as to a disputed occurrence which he had viewed or a disputed conversation or agreement to which he had been a part, but rather was testimony as to his opinion of the value of guns and gun parts. When that testimony was placed side by side with that of disinterested experts from many parts of the country, it appeared incredible. Respondents respectfully submit that a sober examination of the entire record in this case does more to betray petitioner's testimony than would an evasive look or a halting voice, which are the usual manifestations by which a trial judge gauges the demeanor of the witness before him.

Of more serious import, however, is petitioners' discussion of the nature, function and power of a Court of Appeals on review. Petitioner, in both its Petition for Rehearing and this petition, has continually chosen to disregard Rule 52(a) of the Rules of Civil Procedure and

those cases from this Court and the Courts of Appeals for the various circuits interpretive thereof.

Rule 52(a), governing actions tried without a jury, provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Supreme Court has made clear that this provision does not straightjacket a Court of Appeals and reduce it to merely a rubber stamp for the approval of the action of a trial judge. In *United States of America* v. *U. S. Gypsum Co.* 333 U. S. 364, 92 L. Ed. 746, this Court stated:

> "* * * Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury (citations omitted), this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however (citations omitted). A finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. 364, 395, 92 L. Ed. 746, 766.

There is no conflict among the circuits as to the application of Rule 52(a). The Court of Appeals for the Seventh Circuit is fully cognizant of, and has relied upon, the formulation of this Supreme Court. See *Wasserman* v. *Daar*, 11 Fed. Rules Serv. 26(f)1, Case 1.

In *American Eagle Fire Ins. Co.* v. *Burdine*, 200 F. 2d 26, relied upon by petitioners to point up the conflict which petitioners say exists between the Seventh and Tenth Circuits, the Court of Appeals for the Tenth Circuit, after a discussion of the evidence in which it appeared that the preparation of a certain report under the advice of counsel was susceptible to either the inference that it had been made under an honest mistake of judgment or through fraudulent intent, stated in 200 F. 2d at page 28:

> "In these circumstances the trial court's conclusions are not clearly erroneous and they must stand."

It is obvious that if the Court of Appeals had found, as the Court of Appeals for the Seventh Circuit has found here, that the findings of the trial judge were clearly erroneous, that court would have considered itself at liberty to set said findings aside.

Likewise *Waialua Agricultural Co.* v. *Maneja*, 216 F. 2d 466, relied upon by petitioners here, is inapposite. In that case, brought under the Fair Labor Standards Act, the Court of Appeals for the Ninth Circuit held that it could not make new findings to supplement those findings already made by the trial judge, where said additional findings would be necessary for a proper decision of the controversy before it. However, it positively held that it could reverse "clearly erroneous findings" of the court below. We are unaware of any Court of Appeals which has so abdicated its function as a court of review that it would consider such a statement of the law either improper or erroneous.

Respondents respectfully submit that there is no conflict existing between the Court of Appeals of the Seventh Circuit and that of the Eighth Circuit as petitioners claim at page 16 of their Petition. Petitioners rely upon the case of *Imperial Insurance Co.* v. *Joseph Supronick*,

Sons, 184 F. 2d 930, to illustrate such a conflict. In that case, which was, as this one, a diversity action, the Court relied upon the law of the State of Minnesota in affirming a decision of the trial court that an insured was entitled to recover on its policies of insurance. The court relied upon and quoted from *National Fire Ins. Co. v. Itasca Lumber Co.*, 148 Minn. 170, 181 N. W. 337, and stated at page 935:

> "As a general rule it is for the jury to say whether there has been any fraud or false swearing."

Neither the Supreme Court of the State of Minnesota nor the Court of Appeals for the Eighth Circuit stated that the "general rule" precludes an appellate court from setting aside a clearly erroneous finding by a *nisi prius* court.

We, further, respectfully bring to the Court's attention the fact that petitioners have argued in their Petition for Rehearing submitted to the Court of Appeals for the Seventh Circuit, that that court, by relying in this case upon its decision in *American Home Ins. Co. v. Juneau Store Co.*, 78 F. 2d 1001, misread its own prior decision. The Court of Appeals for the Seventh Circuit rejected this argument by denying the Petition for Rehearing and we respectfully submit that this Supreme Court should do likewise, by rejecting the instant Petition.

The case of *Weininger et al. v. Metropolitan Fire Ins. Co.*, 259 Ill. 584, cited by petitioners in their Petition here, was also before the Court below. Major emphasis was given to that case by petitioners in their brief on appeal in the Court of Appeals and that court rejected the argument based thereon.

Lastly, respondents can not refrain from commenting upon the rather curious argument of petitioners to the effect that it is for the legislature rather than the court

to determine the quantum of evidence necessary for a finding of fraud. Such a determination has been a traditionally judicial function and we cannot help but wonder at the nature of the statute which would be drafted by a legislature to govern this issue.

It is patent from Rule 52(a) and the decisions of this Supreme Court that a Court of Appeals may set aside findings of fact when said findings are clearly erroneous. The Court of Appeals, in the instant case, in setting aside the findings of the trial court, remained within the well defined ambit of its power and properly performed its function and duty as a court of review. Respondents respectfully submit that the Court of Appeals for the Seventh Circuit has expressed in most positive language a definite and firm conviction that the findings of the trial court were clearly erroneous. The record before that court could lead to no other conclusion.

CONCLUSION.

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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